IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE
AND HEALTH INSURANCE COMPANY,
also known as BLUE SHIELD OF TEXAS, et al.,

Petitioners

vs.

ROYAL DRUG COMPANY, INC., doing business as
ROYAL PHARMACY OF CASTLE HILLS
and DISCO PRESCRIPTION PHARMACY, et al.,

Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF
THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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All parties have consented to the filing of this Brief for *amicus curiae* in support of respondents, pursuant to Rule 42(2) of the Court.[1]

[1] See letter to Mr. Rodak from counsel for Petitioners and Respondents (April 10, 1978).

INTEREST OF AMICUS CURIAE

The National Association of Retail Druggists (NARD) is a private, nonprofit, voluntary organization founded in 1898 and composed of independent retail pharmacists. NARD membership consists of over 20,000 independent pharmacists. Independent pharmacists fill over two-thirds of the prescriptions filled in the United States annually. Almost all NARD members participate in one or more third party prepaid prescription plans established by profit and nonprofit insurance companies,[2] by state Medicaid programs or by individual companies or unions.

Since their introduction in the early 1960's, third party plans have grown from representing less than 10% of all prescriptions filled by retail pharmacies to more than 24% in 1977.[3] This percentage is expected to continue to increase and, according to a recent NARD survey, already approaches 75 to 80% in some stores in certain parts of the country. As a result, the operation of these plans is of vital interest to retail pharmacists. Accordingly, the Fifth Circuit's decision that activities engaged in by insurance companies and pharmacists which set the price at which retail prescriptions are sold are properly subjects of review under the antitrust laws has a direct and significant impact on NARD members.

SUMMARY OF ARGUMENT

The antitrust laws have long been deemed by this Court to be among the fundamental laws of the land. This Court recently stated in *City of Lafayette*:

> [a]ntitrust laws in general, and the Sherman Act

[2] In addition to plans sold by Blue Cross/Blue Shield, insurance companies offering such plans include, among others, Aetna Life and Casualty Company, Allstate, John Hancock Mutual Life Insurance Company, Lincoln National Life Insurance Company, and Metropolitan Life Insurance Company.

[3] *American Druggists*, Annual Prescription Department Survey, May, 1978, p. 10.

> in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.[4]

The issue before this Court is whether the activities of Petitioners which set the price at which pharmacists sell prescription drugs to policyholders of Group Life and Health Insurance Company are within the "business of insurance" under the McCarran-Ferguson Act and should accordingly enjoy the limited exemption from the antitrust laws provided by that Act.[5] NARD believes that the legislative history of the Act, the policy underlying its passage, as well as this Court's longstanding admonition that antitrust exemptions be narrowly construed fully supports the Fifth Circuit's determination that efforts of insurance companies in combination with non-insurance providers to fix the price of goods or services sold to policyholders of the insurer do not constitute the business of insurance and are,

[4] City of Lafayette v. Louisiana Power and Light Co., ___ U.S. ___, 55 L.Ed.2d 364, 374 n. 16, (March 29, 1978), citing U.S. v. Topco Associates, 405 U.S. 596, 610 (1972).

[5] McCarran-Ferguson Act §§1-3, 15 U.S.C. §§1011-1013 (1976) (hereinafter the "McCarran Act" or the "Act"). As Section I.B., *infra*, shows the effect of the McCarran Act is to allow the states to a limited extent to preempt federal law despite the fact that the activity involves interstate commerce. While this might more properly be termed a limited right of preemption, the McCarran Act has traditionally been discussed as one of the limited exemptions from the antitrust laws. This brief, therefore, uses the traditional term, "exemption."

In reviewing the briefs of the Petitioners and the Amici supporting Petitioners, it would appear that the issues in this case involve: the type of contract which an insurance company can offer an insured; the ways in which companies can supply benefits to employees; a national cost containment policy; and, the right of the states to regulate the business of insurance. *None of these matters are at issue in this case.* The attempt to engraft these issues on to the question of the scope of the exemption from the antitrust laws provided by the McCarrarn Act shows the bankruptcy of Petitioners' position.

therefore, properly subject to review under the antitrust laws. Accordingly, this Court should affirm that result.

The McCarran Act was enacted in response to this Court's holding in *South-Eastern Underwriters* [6] that insurance was commerce, and therefore subject to federal regulation and taxation. Until *South-Eastern Underwriters* the regulation and taxation of the business of insurance was the exclusive domain of states. Congress first considered and rejected legislation which would have totally exempted the business of insurance from federal antitrust laws. Instead Congress, after careful consideration, chose in the form of the McCarran Act to accommodate in conformity with our system of federalism two competing, and sometimes conflicting, legislative schemes. Thus section 2(b) of the McCarran Act provides that the federal antitrust laws are applicable to the business of insurance, except to the extent such laws conflict with state regulation of the business of insurance. Notwithstanding that general accommodation of state insurance regulation and federal antitrust law, Congress further balanced these interests by providing that with respect to agreements and acts of boycott, coercion or intimidation federal antitrust law must prevail over state insurance regulation.

Petitioners would do violence to this careful balance of state and federal regulation by urging this Court to accept a meaning of the "business of insurance" which is contrary to the clear Congressional understanding of the activities which constituted the business of insurance. Congress understood the business of insurance to consist solely of activities between and among insurance companies, their insureds, employees and agents.

Nothing in the legislative history of the Act remotely suggests that Congress intended to exempt from federal

[6] United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) (hereinafter "South-Eastern Underwriters").

antitrust scrutiny activities engaged in by insurance companies which set the price for the sale of goods or services in non-insurance sectors of the economy. Nothing in the policy underlying the McCarran Act requires that the "business of insurance" be interpreted in a way which removes large segments of the non-insurance parts of the economy from the scope of the antitrust laws. Yet, by removing from review under the antitrust laws the legality of activities which set the price at which prescription drugs are sold, the position taken by Petitioners has that inevitable result.

This Court has had numerous occasions in recent years to examine a variety of exemptions to the antitrust laws. This Court has consistently held that such exemptions are to be narrowly construed. Petitioners ("Group Life"), however, seek to have this Court interpret one of the limited statutory exemptions from the antitrust laws in a way which is not necessary for the purpose of that exemption, was not contemplated by Congress, and which greatly expands its scope to the point that large segments of the economy fall under that exemption rather than under the more fundamental laws, the antitrust laws.

ARGUMENT

I.

THE FIFTH CIRCUIT WAS CORRECT IN FINDING THAT ACTIVITIES ENGAGED IN BY INSURANCE COMPANIES AND PARTICIPATING PHARMACISTS WHICH SET THE PRICE OF RETAIL DRUGS ARE NOT THE BUSINESS OF INSURANCE

The Fifth Circuit found that the combination entered into between Group Life and participating pharmacists in Texas which set the price for drugs at $2 for all participating pharmacists did not constitute the "business of insurance"

within the meaning of the McCarran Act.[7] The Fifth Circuit found that Group Life and Health Insurance Company was not required by its obligation to its customers or by state mandate to fix the retail price of prescription drugs.

Public and private third party prepaid prescription plans presently cover more than 24% of all prescriptions filled. In 1977, this 24% represented nearly 400 thousand prescriptions, which were sold for approximately 1.8 billion dollars.[8] The position taken by Group Life would exempt activities engaged in by insurance companies and participating pharmacists which would determine the price at which these drugs would be sold. In some areas third party prescriptions amount to 75 to 80% of all prescriptions filled. Because of the discriminatory payment provisions for non-participating pharmacists, a pharmacist unwilling to enter into a third party provider agreement with an insurance company is effectively excluded from the right to compete for that business within his community.

While it seems clear that these plans have the purpose and effect of fixing the retail price of these drugs, that issue is not before this Court. If the Court affirms the Fifth Circuit's decision, this case will return to the trial court for a determination of whether the arrangements between participating pharmacists and Group Life constitutes either an illegal price fixing arrangement or an illegal boycott of nonparticipating pharmacists. The only issue decided by the Fifth Circuit was that the activities engaged in by the insurance company and the participating pharmacists establishing the price at which the pharmacists would sell drugs to policy holders of the insurance company was not the business of insurance and, therefore, could be reviewed

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[7] Royal Drug Company, Inc. v. Group Life & Health Insurance Company, 556 F.2d 1375, 1383-7 (5th Cir. 1977).

[8] *American Druggists*, Annual Prescription Department Survey, May, 1978, p. 17.

under the antitrust laws. That decision is correct based on the history of the McCarran Act, the scope of the exemption provided by that Act and the proper relationship between that exemption and the antitrust laws.

A. Non-State Mandated Activities Engaged In By Insurance Companies Which Set The Price For Non-Insurance Products Are Not The Business Of Insurance.

As indicated above, the McCarran Act exemption is limited to the "business of insurance." To understand whether the activities at issue in this case fall within this term, it is necessary to review the specific activities involved in light of the legislative history, policy, and purpose of the McCarran Act.

Third party prepaid prescription plans generally are developed by insurance companies either independently or in conjunction with a plan sponsor, such as a union or corporation. Under these plans the insurance company insures against the risk that the insured will be unable to pay for prescription drugs during the period of coverage. The amount of the risk borne by the insured is negotiated between the insured and the insurance company. The amount of risk assumed by the insurance company can be lessened by requiring more co-payment by the insured or having an increased deductible. The insured and the insurance company may negotiate any form of policy they desire. If the policy, which governs the relationship between the insured and the insurance company, is regulated by the state, it is clear that it is exempted from antitrust review by the McCarran Act. This case, as the Fifth Circuit made clear, does not involve the question of the right of an insurance company to issue any type of policy to its insured on which the parties agree.[9] This is clearly part of the business of insurance.

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[9] Royal Drug, *supra*, 556 F.2d at 1382.

The rate the insured pays is determined by the insurance company based on its judgment of the cost involved in covering the risk it assumes. It is clear that states can regulate insurance company rates under the McCarran Act and that insurance companies can engage in certain cooperative activities in that regard. It is also clear that the establishment of a rate is part of the business of insurance.

Under traditional concepts of insurance, having set the rate, the insurance company either profits from such a policy or suffers losses depending on its skill in having predicted the scope of the risk it has assumed. In connection with third party plans, such as the one at issue, however, insurance companies have sought to ensure the profitability of such plans by controlling the price of the products and services covered by the policy. The insurance company accomplishes this by entering into agreements initially with those pharmacies prepared to accept a low fee either because of the minimal services offered by the pharmacy, or, because of their willingness to sustain a loss in their prescription departments because of their high profit margin in the many lines of non-pharmaceuticals sold. This agreement between high volume pharmacies, almost always non-pharmacist owned chain drug stores, is then "offered" to other competing pharmacists who either must accept the contract and the retail price established by it, or write off the business of the insured. All pharmacists accepting the contract are aware that all other pharmacists accepting the contract will be selling drugs to policyholders of the insurer at the same price. All pharmacists "offered" this contract are also aware that if they do not accept it they cannot compete for that portion of the business.

The effect of this combination between the insurance company and the chains is to lessen the consumer's choice concerning the types of pharmacy services available to him. Absent the artificial restraints imposed by the prices

established by this combination, one of the primary methods of competition between pharmacies is the provision of different types and levels of services, such as, direct consultation on drug use and interactions, patient profiles to assist in preventing improper drug interactions, delivery service for prescription drugs, as well as 24-hour emergency service. At the prices imposed by the combination of the insurance companies and the chains, the independent pharmacist is forced to offer the same limited services as the chains. As a result, the consumer is deprived of the opportunity of choosing between a full service pharmacy and the limited services available from most chains.

Except for the fact that the insurance companies desire to ensure their own profitability, there is no reason that third party provider contracts need to be established, or, if established, need to set the price paid by the insured. This is not only clear as a matter of common sense, but is amply demonstrated by the fact that a number of third party prepaid prescription plans utilize non-fixed fee payment methods and the fixed fee method is not used in most other forms of insurance.[10] While insurance companies may understandably desire to ensure their profitability, actions taken for that purpose are not necessarily "the business of insurance." As discussed in Section I.B. it is clear that nothing in the history, policy, or purpose of the McCarran Act, or in the cases decided by this Court interpreting the Act, support the view that activities which set the price of goods sold by non-insurance providers and, only indirectly affect the relationship between the insurance

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[10] Blue Cross/Blue Shield in Virginia and Oklahoma operate their prescription programs on a usual and customary fee basis. Other non-fixed fee third party prepaid prescription plans include the Iowa Pharmacy Service Corporation, Blue Cross/Blue Shield of New Jersey, New Jersey Medicaid, New Jersey Paid Rx, Veterans Administration, Allstate Insurance, and Minnesota Pharmaceutical Service Corporation. Numerous corporate and union plans are also offered on a non-fixed fee basis.

company and the insured, are the business of insurance within the meaning of the McCarran Act.

Group Life and *amici* filing in support of Group Life argue that provider contracts which set the fee to be paid a pharmacist and the price to be paid by the insured should fall within the McCarran Act because such contracts provide insurance companies with a cost containment mechanism. While the fixing of prices and fees may well provide a way to hold down insurance company costs, the ultimate legality of this or other cost containment practices is not before this Court, and, on its own provides no support for expanding the scope of the McCarran Act exemption. This Court has long held that because of its pernicious effect the motivation for price fixing is irrelevant. *Kiefer-Stewart v. Seagrams,* 340 U.S. 211, 213, (1951).

While various aspects of health care have shown significant cost increases in recent years, this is not the case with pharmacy fees. In those areas in which health care costs have increased significantly, Congress has passed or is considering legislation [11] and the Department of Health, Education and Welfare is considering various regulations.[12] Such federally mandated cost containment procedures are similar to the procedures imposed by the Commonwealth of Pennsylvania evident in the *Travelers Insurance Company* [13] and *Doctors, Inc.*[14] cases. Such state mandated procedures may well pass antitrust muster and can be used to accomplish cost containment in those situations in which a state or federal body determines it is necessary and in the public interest. This form of mandated regulation is the very type of balancing of interests which this Court has indicated is necessary before the antitrust laws are to be set aside.[15]

Such state mandated activity is vastly different from "cost containment" programs imposed on large segments of the economy by private parties with the primary interest of increasing their own profits. If cost containment is appropriate in this area, Congress or the states should impose it.

B. The Legislative History Of The McCarran Act Establishes That Activities With Non-Insurance Third Party Providers To Fix The Price Of A Non-Insurance Product Is Not Within The Business Of Insurance.

1. Introduction

The McCarran Act was enacted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944).[16] In *South-Eastern Underwriters,* the Court held that the busi-

[11] See, e.g., Social Security Act and Amendments, 42 U.S.C. §1320 (1975); Hospital Cost Containment Act of 1977, H.R. 6575 and S. 1391, 95th Cong. 1st Sess. (1977).

[12] See, e.g. 45 C.F.R. 19; Department of Health, Education and Welfare, Proposed Regulation 42 C.F.R. 450, published at 43 Fed. Reg. 20516 (May 12, 1978).

[13] Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 83-84 (3d Cir.) *cert. denied,* 414 U.S. 1093 (1973).

[14] Doctors, Inc. v. Blue Cross of Greater Philadelphia, 557 F.2d 1001 (3d Cir. 1976), *aff'g,* 431 F. Supp. 5, 10 (E.D. Pa. 1975).

[15] City of Lafayette v. Louisiana Power and Light Co., — U.S. —, 55 L.Ed.2d 364, 383-84 (March 29, 1978).

[16] In United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), defendent association, defendants insurance companies and individual defendants were indicted for conspiring to fix insurance rates and commissions, and for conspiring to boycott and coerce other insurers, agents and insureds who did not accept defendants' policies. Defendant insurance companies, all fire insurance companies, accounted for 90 percent of fire insurance sold in six southeastern states. Defendants, not arguing the antitrust merits, contended that the business of insurance was not commerce and, therefore, not subject to antitrust law. The District Court agreed with defendants and dismissed the indictments. United States v. South-Eastern Underwriters Association, 51 F. Supp. 712 (N.D. Ga. 1943).

ness of insurance was "commerce" and, therefore, subject to federal regulation under the commerce clause.[17]

In so finding, the Court overruled a line of decisions which held that the business of insurance was not commerce. These decisions had followed the 1869 decision of *Paul v. Virginia*, 75 U.S. [8 Wall.] 168 (1869), which upheld a Virginia statute regulating foreign insurance companies doing business in Virginia.[18] Thereafter, courts upheld state regulation and taxation of the business of insurance, even if interstate commerce was involved. As such, regulation and taxation of the business of insurance was by the states, not the federal government.[19]

South-Eastern Underwriters threatened the continued existence of state regulation and taxation of the business of insurance. First, by holding the business of insurance to be commerce, it threatened the constitutionality of state regulation and taxation of the business of insurance.[20]

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[17] U.S. CONST. art. I, §8.

[18] The Court stated that ". . . issuing a policy of insurance is not a transaction of commerce." Paul v. Virginia, 75 U.S. [8 Wall.] 168, 183 (1869).

[19] *See Report of Subcommittee on Federal Legislation to Executive Committee of National Association of Insurance Commissioners* (Aug. 29, 1944), *reprinted at* 90 Cong. Rec. A4403-06 (Nov. 16, 1944) [hereinafter "*Report of National Association of Insurance Commissioners*"].

[20] Revenue from state taxation of the business of insurance was an important source of income to states. In 1942 the forty-eight states received $113,022,000 from taxation of insurance. 90 Cong. Rec. 6548 (June 22, 1944). After *South-Eastern Underwriters*, insurance companies refused to pay state taxes on the ground that that decision rendered state regulation and taxation unconstitutional. *See* S. Rep. No. 20, 79th Cong. 1st Sess. (Jan. 24, 1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. (Feb. 13, 1945); 91 Cong. Rec. 478-79 (Jan. 25, 1945) (remarks of Senator Ferguson). The Attorney General of North Carolina agreed. He ruled that North Carolina could no longer tax insurance companies doing business in North Carolina. 91 Cong. Rec. 1085 (Feb. 14, 1945) (remarks of Representative Walter).

Second, it opened the door to express federal regulation of the business of insurance. Third, even without express federal regulation, state regulation and taxation was threatened with implicit preemption through the commerce clause by federal laws and regulations.[21]

As will be shown below, the initial, but not final, reaction of Congress to *South-Eastern Underwriters*, was to restore the status quo by exempting the business of insurance from the federal antitrust laws. Ultimately, as this Court found as recently as June 29, 1978 in *St. Paul Fire & Marine Insurance Co. v. Barry*, — U.S. —, 46 U.S.L.W. 4971, 4973 (June 29, 1978) the purpose of the McCarran Act was limited to allowing the states the right to regulate and tax the business of insurance, notwithstanding that the business of insurance involves interstate commerce. In each successive step of the legislative process, Congress narrowed the antitrust exemption for the business of insurance until it arrived at the very narrow exemption contained in the proviso clause of section 2(b) of the McCarran Act.[22]

The proviso clause provides that federal antitrust laws apply to the business of insurance to the extent that such business is not regulated by state law. That is, federal antitrust laws apply to activities of insurance companies unless the activities meet the following two prerequisites: (1) the activities must be within the business of insurance, and (2) the activities must be regulated by state law. If these two prerequisites are met, federal antitrust laws do not apply to such activities to the extent the state regulates such activities.

The Fifth Circuit found that the activities of petitioner Group Life and the participating pharmacists, who are

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[21] *See Report of National Association of Insurance Commissioners*, *supra* at A4404.

[22] 15 U.S.C. § 1012(b).

not insurance providers, which fixed the price of drugs sold to Group Life policyholders by participating pharmacists were not within the business of insurance. The correctness of that holding can be seen in light of, and is established by, the legislative history, policy and purpose of the McCarran Act.

The legislative history shows that the congressional purpose in enacting the McCarran Act in general and section 2(b) in particular was to accommodate two competing, and sometimes conflicting, statutory schemes, state insurance regulation and federal antitrust laws. Consistent with our Federalist system of state and national government, Congress chose to allow each to apply to the business of insurance. If, and to the extent, federal antitrust laws conflict with state insurance regulation, the federal antitrust laws are preempted. But, in further balance of that scale of accommodation, if the conflict involves the antitrust laws' prohibition against agreements and acts of boycott, coercion and intimidation, state insurance regulation is preempted.

Consistent with that purpose Congress intended the business of insurance to include only activities between and among insurance companies, their insureds, employees and agents, which were part of state insurance regulatory schemes. Beyond those activities constituting the business of insurance, Congress intended that federal law, including the federal antitrust laws, preempt state law in accordance with the commerce clause. Petitioners, in direct contradiction of this delicate balance of the McCarran Act and of the commerce clause, would contort the meaning of the "business of insurance" so as to expand its coverage to include petitioners' activities which fixed prices of a non-insurance product, pharmaceuticals, and thereby avoid application of the federal antitrust laws to those activities. But, the legislative history, policy and purpose of the McCarran Act establish that the Fifth Circuit's holding

is correct. Petitioners' activities are not within the business of insurance.

2. Congressional Reaction Evolved From Total Antitrust Exemption To Only Preserving State Regulation And Taxation Of The Business Of Insurance.

With an apparent ability to predict the Court's decision, legislation [23] to totally exempt the business of insurance from federal antitrust law was introduced prior to *South-Eastern Underwriters*. The operative language of the total exemption legislation was as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several states.[24]

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[23] On September 20, 1943, Representative Hancock introduced H.R. 3269 and Representative Walter introduced H.R. 3270. On the following day, September 21, 1943, Senators Bailey and Van Nuys introduced S. 1362. All three bills totally exempted the business of insurance from antitrust law. Joint Senate and House hearings were held on H.R. 3269, H.R. 3270 and S. 1362. *See Joint Hearings Before the Subcommittees of the Committees on the Judiciary on S. 1362, H.R. 3269, and H.R. 3270,* 78th Cong., 1st and 2d Sess. 1 (1944). Joint hearings were held on October 20 and 27, 1943; November 3, 1943; December 3, 14, 15 and 21, 1943; March 30, 1944; May 26 and 27, 1944; and June 23, 1944. S. Rep. No. 1112, 78th Cong., 2d Sess (Sept. 20, 1944).

[24] H.R. 3270 and S. 1362 contained identical language and were introduced as companion bills. *See* 89 Cong. Rec. A5377 (Dec. 9, 1943) (remarks of Representative LaFollette). The full text of H.R. 3270 and S. 1362 is set forth in Appendix A.

The total exemption bills failed for several reasons.[25] First, and foremost, the total exemption bills were not supported by the National Association of Insurance Commissioners ("NAIC").[26] The NAIC favored a limited exemption to the states, not to insurance companies, only as broad as necessary to continue state regulation and taxation.[27] The NAIC was in the process of drafting a bill which it expected to have ready by September 1, 1944.[28] Opponents of the total exemption bills argued that Congress before acting should wait for the states to speak.[29]

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[25] Just over two weeks after this Court's decision in *South-Eastern Underwriters,* the House on June 22, 1944 passed H.R. 3270. 90 Cong. Rec. 6565 (June 22, 1944). However, the bill did not pass the Senate. On September 21, 1944 the Senate first passed, then reconsidered and passed over the bill. 90 Cong. Rec. 8054 (Sept. 21, 1944). Despite further efforts to pass a total exemption bill, none would again come as close as did H.R. 3270 on September 21, 1944.

[26] *See* letter dated November 22, 1944 to Senator Arthur H. Vandenberg from Michigan Insurance Commissioner David Forbes, *reprinted at* 90 Cong. Rec. 8482 (Nov. 28, 1944). The letter, in part, stated as follows:

> The Commissioners believe that the insurance business has no more right to ask for a blanket exclusion from these acts than any other business that has been held to be engaged in interstate commerce.

[27] *See Report of National Association of Insurance Commissioners, supra* at A4405; *Joint Statement of Newell R. Johnson, President, Edward R. Scheufler, Chairman of the Executive Committe, and Charles F.J. Harrington, Chairman of the Subcommittee on Federal Legislation of the National Association of Insurance Commissioners, reprinted at* 90 Cong. Rec. A4406 (Nov. 16, 1944) [hereinafter "NAIC Joint Statement"].

[28] Letter dated June 20, 1944 to Representative Clinton P. Anderson from the President of NAIC, Newell R. Johnson, *reprinted at* 90 Cong. Rec. 6420 (June 21, 1944).

[29] 90 Cong. Rec. 6420 (June 21, 1944); S. Rep. No. 1112, pt. 2, 78th Cong., 2d Sess. (Sept. 20, 1944) (Minority Report). The Minority Report at 6 noted as follows:

> The executive committee of the National Association of Insurance Commissioners has been called to meet in Chicago on September 29 and 30 for the purpose of implementing the declaration of principles unanimously adopted at St. Louis. . . . . Congress should accede to the request of this group and . . . no definite action should be taken until after these State officials have had an opportunity to present to the Congress the report upon which they are now working. *Surely it is a strange way for Congress to defend States rights by declining to await the specific recommendations of responsible State officials.* (Emphasis added).

Significantly, while stock fire and casualty fire companies favored total exemption, life insurance companies and mutual fire and casualty companies did not. The latter favored the NAIC position.[30]

Another reason for the failure of the total exemption bills was the antipathy toward exempting any industry from the antitrust laws, and the fear that other industries would seek similar legislation. Coupled with this concern was the fear that once totally exempted, the insurance industry would prey upon small businesses and individual insureds.[31]

A final reason was the opposition, and threatened veto, of President Roosevelt.[32] The Department of Justice op-

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[30] Letter dated November 22, 1944 to Senator Arthur H. Vandenberg from Michigan Insurance Commissioner David Forbes, *reprinted at* 90 Cong. Rec. 8482 (Nov. 28, 1944).

[31] *See e.g.,* the debates in the House of Representatives on June 21 and 22, 1944 with regard to H.R. 3270 printed at 90 Cong. Rec. 6449-6455 (June 21, 1944) and 90 Cong. Rec. 6521-6557, 6559-6565 (June 22, 1944); S. Rep. No. 1112, pt. 2, 78th Cong., 2d Sess (Sept. 20, 1944) (Minority Report); 90 Cong. Rec. 6455 (June 21, 1944) (remarks of Representative Poage).

[32] 91 Cong. Rec. 1087 (Feb. 14, 1945) (remarks of Representative Hancock). Representative Hancock, ultimately one of three House conferees, during the debate on the House version of S. 340, which became the McCarran Act cited to the threat of Presidential veto of the total exemption bill. He stated as follows:

> I was a strong supporter last year of the Walter bill [H.R. 3270]. . . . But we believe we cannot pass that bill as the Senate is now constituted, and we are told with some assurance that the President would veto it.

See 91 Cong. Rec. 1089 (Feb. 14, 1945) (remarks of Representative Anderson).

posed H.R. 3270 on the grounds that it would totally exempt the business of insurance; that it would interfere with pending criminal prosecutions; and that it was unnecessary to preserve state regulation in light of *Parker v. Brown*, 317 U.S. 341 (1943).[33] The Administration favored a moratorium on antitrust law during which the insurance industry could bring itself into compliance.[34]

Accordingly, Congress was not prepared to give the insurance industry a blanket exemption from the antitrust laws under which insurance companies would be free to engage in anticompetitive activities. Thus, as a threshold matter the McCarran Act is not, and never was intended to be, a total exemption from the antitrust laws.

As discussed above, the NAIC requested Congress not to pass the Walter total exemption bill, H.R. 3270, and to wait to consider a bill it was preparing. On August 29, 1944 the NAIC released its Report of the National Association of Insurance Commissioners.[35] That Report made four specific recommendations regarding new legislation.[36]

[33] H.R. Rep. No. 873, 78th Cong., 1st Sess. (Nov. 18, 1943); S. Rep. No. 1112, 78th Cong., 2d Sess. (Sept. 20, 1944).

[34] Letters dated June 10, 1944 and January 2, 1945 to Senator George L. Radcliffe from Franklin D. Roosevelt, President of the United States, *reprinted at* 91 Cong. Rec. 482 (Jan. 25, 1945).

[35] *Reprinted at* 90 Cong. Rec. A4403-06 (Nov. 16, 1944).

[36] First, to deal with the commerce clause problem it recommended legislation affirmatively establishing that the regulation and taxation of the business of insurance by states continue. Second, it recommended that the Federal Trade Commission Act be amended so as to eliminate from its scope the business of insurance. Third, it recommended that the Robinson-Patman Act be amended so as to eliminate from its scope the business of insurance. Fourth, it recommended that the Sherman Act and Clayton Act be amended to permit the business of insurance to engage in ". . . all reasonable and cooperative procedures necessary and incidental to the establishment of statistical rate bases, rates, coverages and related matters." *Id.* at A4405.

The key recommendation, and what was to be the central theme of the McCarran Act, was that Congress enact legislation under the commerce clause that secured to the states the right to continue regulating and taxing the business of insurance. The remaining three recommendations were with respect to federal antitrust laws. Each sought to effectuate, with respect to certain specifics, the ability of states to regulate and tax the business of insurance. Thus, the second recommendation that the Federal Trade Commission Act[37] be amended to eliminate jurisdiction over the business of insurance was urged to eliminate the possibility that the Federal Trade Commission would preempt state regulation. Similarly, the recommendation to amend the Robinson-Patman Act[38] stemmed from a fear that "commodities" would be strained to include insurance and, thereby, outlaw broker commissions. The last recommendation, which was to amend the Sherman Act[39] and Clayton Act[40] to allow cooperative practices, reflected the form of much state regulation, which not only allowed cooperative practices, but often required it. For purposes of understanding the meaning of the "business of insurance," it is significant to note that in seeking amendment of the Sherman Act and Clayton Act, the NAIC sought to preserve cooperative activities between and among insurance entities.[41]

Accordingly, from the outset the purpose of the NAIC, which represented the state insurance commissioners, was

[37] 15 U.S.C. §41 *et seq.* (1970).

[38] 15 U.S.C. §13-13b, 21a (1970).

[39] 15 U.S.C. §1 *et seq.* (1970).

[40] 15 U.S.C. §12 *et seq.* (1970).

[41] The *Report of the National Association of Insurance Commissioners* noted that "[t]o prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business." 90 Cong. Rec. A4405 (Nov. 16, 1944).

to protect the continued regulation and taxation by states of the business of insurance, and not to exempt that business from the antitrust laws. The three recommendations regarding the antitrust laws were for the limited purpose of curing antitrust prohibitions against specific practices, such as cooperative rate-making, which were part of the state regulatory schemes. The recommendations only concerned activities within and among the insurance industry. No suggestion was made to include within the business of insurance activities with non-insurance entities, such as pharmacists.[42]

On November 16, 1944, the NAIC released the text of its proposed bill.[43] Section 2(a) of the NAIC bill specifically provided that "[t]he business of insurance . . . shall be subject to the laws of the respective states which relate to the regulation of such business and which impose fees or taxes thereon."[44] The bill provided in section 2(b) that no federal act will invalidate, impair or supersede state law regulating the business of insurance unless the federal act specifically so provides.[45] Section 3 provided that neither the Federal Trade Commission Act nor the Robinson-Patman Act would apply to the business of insurance.

Section 4, which was subdivided into three parts, (a), (b) and (c), dealt with the Sherman and Clayton Acts. Subsection (a) contained a moratorium prohibiting the application of the two Acts to the business of insurance until July 1, 1948. Subsection (b) enumerated seven specific acts which would not be prohibited by the Sherman Act.[46] Finally subsection (c) provided that the Sherman Act prohibition against acts of boycott, coercion, or intimidation would apply to the business of insurance. Subsection (c), in effect, made two limitations. First, it limited the moratorium to acts other than of boycott, coercion, or intimidation. Second, it limited a state's right as provided by section 2(b) to preempt federal antitrust laws. A state could not regulate inconsistently with the Sherman Act's prohibition against acts of boycott, coercion or intimidation.

[42] The *Report of the National Association of Insurance Commissioners* emphasized that in recommending relief from the Sherman Act and Clayton Act it was not ". . . condoning any oppressive or destructive practices." *Id.*

[43] 90 Cong. Rec. A4406 (Nov. 16, 1944). The full text of the NAIC bill is set forth at Appendix B.

[44] *Id.*

[45] Section 2(b) was the forerunner of the first part of section 2(b) of the McCarran Act.

On January 18, 1945, McCarran and Ferguson introduced the NAIC bill, as amended by the deletion of the enumerated practices of section 4(b), which received the designation S. 340.[47] It was S. 340, as amended, that President Roosevelt signed into law on March 9, 1945.

One week after being introduced, the Senate Committee on the Judiciary reported S. 340 to the Senate. That same day it was debated and passed with two amendments.[48] The first amendment added a prohibition against *agreements* to boycott, coerce or intimidate to section 4(b) which already prohibited *acts* of boycott, coercion or intim-

[46] Subsequently, it was eliminated because of concern that enumerating specific practices was too rigid. The drafters of subsection 4(b) foresaw this problem. *The Memorandum of Explanation of Proposed Text of Legislation* with regard to subsection 4(b) states as follows:

> It is within the realm of possibility that other legitimate practices in the business which are not specified should have express recognition.

Id. at A4407.

[47] Senators McCarran and Ferguson initially introduced the bill on December 19, 1944. But the 78th Congress never acted on it. The full text of S. 340 as introduced is reprinted herein at Appendix C.

[48] 91 Cong. Rec. 488 (Jan. 25, 1945).

idation.[49] The effect of that amendment was to further limit a state's power to preempt the federal antitrust laws.

The second amendment concerned section 2(b).[50] The debate with regard to section 2(b) concerned the extent to which state law under section 2(b) could preempt the Sherman and Clayton Acts. It provided as follows:

> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.[51]

The problem was whether section 2(b) meant that since the Sherman and Clayton Acts did not specifically provide that each applied to the business of insurance, state law superseded each.[52] Proponents for the supremacy of the Sherman and Clayton Acts over state law prevailed, and section 2(b) was amended to except the Sherman and Clayton Acts from it.[53] As passed by the Senate, section 2(b) of S. 340 read, with the amendment in italics, as follows:

> (b) No act of Congress, *except the act of July 2, 1890, as amended, known as the Sherman Act, and/or the act of October 15, 1914, as amended, known as the Clayton Act,* shall be construed to invalidate, impair, or supersede any law enacted by

[49] This amendment was recommended by the Senate Committee on the Judiciary. S. Rep. No. 20, 79th Cong., 1st Sess. (Jan. 24, 1945). The bill, as reported out of the Committee, is printed at 91 Cong. Rec. 478 (Jan. 25, 1945).

[50] Section 2(b) of S. 340 had remained as drafted by the NAIC.

[51] 91 Cong. Rec. 478 (Jan. 25, 1945).

[52] *See* 91 Cong. Rec. 478-88 (Jan. 25, 1945).

[53] The amendment was offered by Senator Ferguson. 91 Cong. Rec. 486 (Jan. 25, 1945).

> any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides. (Emphasis added).

91 Cong. Rec. 488 (Jan. 25, 1945).

On February 13, 1945, the House Committee on the Judiciary reported S. 340 with the Committee's amendments to the House.[54] The Committee amended S. 340 by returning section 2(b) to its original language without the amendment excepting the Sherman and Clayton Acts; amending section 4(a) to delete the precatory language expressing that section's purpose;[55] amending section 4(a) to make the Sherman Act moratorium extend to January 1948, which was the date the Clayton Act moratorium extended to; and returning section 4(b) to its original language by deleting the word *agreement* so that the subsection only prohibited "any act of boycott, coercion, or intimidation."[56]

[54] S. 340, as amended by the House Committee on the Judiciary, was designated H.R. 1973. 91 Cong. Rec. 978 (Feb. 9, 1945) (remarks of Representative Walter).

[55] Section 4(a), as passed by the Senate, read with the language deleted by the House Committee on the Judiciary, in italics, as follows:

> Sec. 4(a) *For the purpose of enabling adjustments to be* made and legislation to be adopted by the *several States and Congress,* until June 1, 1947, the act of July 9, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to act in the conduct of such business, and until January 1, 1948, the act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to such business or to acts in the conduct thereof. (Emphasis added).

91 Cong. Rec. 488 (Jan 25, 1945).

[56] The text of S. 340, as amended and reported to the House by the Committee on the Judiciary, may be found at either 91 Cong. Rec. 1085 (Feb. 14, 1945) or H.R. Rep. No. 143, 79th Cong, 1st Sess. (Feb. 13, 1945).

The House passed S. 340 as amended by its Committee on the Judiciary on February 14, 1945.[57] In so doing, the House understood that at Conference Committee the limited preemption right contained in S. 340 was to be narrowed further and that the exemption from the Robinson-Patman and Federal Trade Commission Acts contained in section 3 was to be eliminated. First, the deleted prohibition against any *agreement* of boycott, coercion, or intimidation was to be reinstated at Conference Committee.[58] The effect of this change was to further limit the ability of the states to regulate in conflict with the Sherman Act.[59] Second, the *exemption* from the Robinson-Patman and Federal Trade Commission Acts contained in section 3 was deleted. Instead, each was included in the moratorium provision.[60] The effect of the deletion of

[57] The House debate of S. 340 on February 14, 1945 is at 91 Cong. Rec. 1085-1094 (Feb. 14, 1945).

[58] During the debates Representative Celler informed the House that the Attorney General of the United States opposed the House version of S. 340 because subsection 4(b) did not prohibit agreements of boycott, coercion and intimidation. Representative Cellar stated as follows:

> I asked him [the Attorney General] why [he was opposed] and he said he was opposed to it because there was stricken from the bill language which would proscribe and make unlawful not only acts to intimidate, boycott and to coerce but also agreements to coerce and to boycott.

91 Cong. Rec. 1086 (Feb. 14, 1945). Representative McCormack then asked Representative Walter, ultimately one of three House conferees, if he would reinstate the agreement language at Conference Committee. Representative Walter agreed. 91 Cong. Rec. 1088 (Feb. 14, 1945). As passed by the Senate, S. 340 already contained the prohibition against such agreements.

[59] The reinstatement of *agreement* expanded the scope of section 4(b), which ultimately became section 3(b) of the McCarran Act. Since section 3(b) limited the state's preemption right provided in section 2(b), expanding 3(b) had the effect of limiting a state's right to preempt federal antitrust laws.

[60] Section 3 had remained intact from the first version of the NAIC bill introduced on November 16, 1944. The purpose of section 3 was first, to permit the states to continue to regulate certain practices feared violative of the Robinson-Patman Act and, second, to prevent the Federal Trade Commission from preempting state regulation of the business of insurance. The purpose of section 3 was not to immunize insurance companies from the Robinson- Patman and Federal Trade Commission Acts. Nevertheless, since section 3 provided an *exemption*, it did exactly that; it immunized insurance companies from the Robinson-Patman and Federal Trade Commission Acts. *See, e.g.*, 91 Cong. Rec. 1027-28 (Feb. 12, 1945) (remarks of Representative Cochran). Representative Kefauver sought and received the agreement of Representative Sumners, another of the three House conferees, that at Conference Committee section 3 would be eliminated, and the Robinson-Patman and Federal Trade Commission Acts would be included in the moratorium provisions of subsection 4(a). 91 Cong. Rec. 1092-93 (Feb. 14, 1945). After January 1, 1948, these Acts would be subject to the *preemption* provision of subsection 2(b).

section 3 was to remove the last provision which would have conferred on the insurance industry antitrust immunity. The deletion of section 3 meant that S. 340 solely pertained to the right of states to regulate and tax the business of insurance.

The Conference Committee,[61] in reconciling the differences between the House and Senate versions of S. 340, made two important changes. First, section 3 was deleted and the Robinson-Patman and Federal Trade Commission Acts were incorporated into the moratorium provision of section 4(a).[62] Second, section 2(b) was redrafted to eliminate the language excepting the Sherman and Clayton Acts and substituting, in lieu thereof, language which made the Sherman and Clayton Acts ". . . applicable to the business of insurance to the extent that such business is

[61] The House conferees were Hatton W. Sumners of Texas, Francis E. Walter of Pennsylvania, and C. E. Hancock of New York. The Senate conferees were Pat McCarran of Nevada, Joseph C. O'Mahoney of Wyoming, and Homer Ferguson of Michigan. H.R. Rep. No. 213, 79th Cong., 1st Sess. (Feb. 22, 1945) (Conference Report).

[62] With the deletion of section 3, each following section was renumbered. Thus, section 4(a) of S. 340 became section 3(a) of the McCarran Act.

not regulated by state law."[63] The Conference Committee version of S. 340 became the McCarran Act.[64]

In sum, the Congressional response to *South-Eastern Underwriters* evolved from total exemption bills to the McCarran Act. That is, from giving the insurance industry complete and total immunity from the federal antitrust laws to providing that the states could preempt federal antitrust laws to the limited extent such federal law conflicted with state insurance regulation. That preemption right was limited. States could not preempt the Sherman Act prohibition against agreements or acts of boycott, coercion or intimidation. The insurance industry itself received no antitrust immunity. Activities of insurance companies were only immune if within the business of insurance and regulated by state insurance law. Moreover, that immunity was only to the extent the activities were regulated by state insurance law.

3. The Legislative History Of The McCarran Act Establishes That The Business Of Insurance Does Not Include Activities Restraining Competition In Non-Insurance Markets.

a. Introduction

As the foregoing review of its legislative history establishes, the purpose of the McCarran Act was to allow the states to regulate and tax the business of insurance. To effectuate that purpose, section 2(b) of the Act provides that federal antitrust laws, except with respect to agreements or acts of boycott, coercion, or intimidation, do not apply to the business of insurance to the extent that the

[63] H.R. Rep. 213, *supra* at 2.

[64] The House on February 23, 1945, without debate, passed the Conference Committee version of S. 340. 91 Cong. Rec. 1396 (Feb. 23, 1945). Four days later, on February 27, 1945, the Senate, after debate, passed the Conference Committee version of S. 340. 91 Cong. Rec. 1489 (Feb. 27, 1945). On March 9, 1945 President Roosevelt signed it. 91 Cong. Rec. 1992 (March 12, 1945).

state regulates that business. Review of the legislative history of section 2(b) reveals that it, like the Act itself, evolved from a broad repeal of federal antitrust laws to a narrow preemption right tailored to meet existing state insurance regulatory schemes. Consistent with that evolution and the Act's accommodation of both state insurance regulation and federal antitrust laws, the legislative history establishes that the "business of insurance" encompasses only acts between and among insurance entities, such as cooperative rate making and statistical gathering, then at the heart of state insurance regulatory schemes. Moreover, the legislative history of section 2(b) establishes that the "business of insurance" did not include activities with, or in restraint of competition between, non-insurance third parties.

b. Section 2(b) of the McCarran Act.

Section 2(b) of the McCarran Act may be divided into two distinct parts. The first part addresses the problem of implicit federal preemption of state regulation by eliminating the possibility. It provides that there be no implicit federal preemption by legislating that federal law not be construed to invalidate, impair or supersede state laws regulating or taxing insurance, unless the federal statute expressely so provides. This first part had its genesis in the original NAIC bill. The *Memorandum of Explanation of Proposed Text of Legislation* released by the NAIC jointly with the NAIC bill explains, in part, this language as follows:

> Subsection (b): This subsection further implements the earlier expression of the Congressional policy and will, and is designed to eliminate or at least minimize conflict between State laws and existing and further acts of Congress and perhaps more important, to furnish a guide to the courts in

any litigation which may ensue as to just what the Congress intended.[65]

The second part, the proviso clause, provides that federal antitrust laws apply to the business of insurance except to the extent that business is regulated by state law. Its origins are in the January 25, 1945 Senate debate of the first part of section 2(b).

The NAIC bill, as introduced by Senators McCarran and Ferguson, designated S. 340 and reported to the Senate by its Committee on the Judiciary retained the NAIC bill's language. Thus, on January 25, 1945, when the Senate debated S. 340, section 2(b) did not contain the proviso clause, and it read as follows:

> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.[66]

During the debate, it was realized that section 2(b) could be read, once the section 4(a) moratorium expired on January 1, 1948, to allow states to permit monopolies or monopolistic practices. This anomaly resulted from the fact that the antitrust laws did not expressly relate to the business of insurance.[67] Senator Taft, addressing the point, stated as follows:

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[65] 90 Cong. Rec. A4407 (Nov. 16, 1944).

[66] 91 Cong. Rec. 478 (Jan. 25, 1945).

[67] Section 2(b) may not have orginally contemplated the federal antitrust laws. S. 340 retained section 2(b) in the same form as drafted in the NAIC bill. In expressing the purpose of section 2(b) the NAIC did not even refer to antitrust law. Rather, it addressed the problem of state licensing of insurance companies, the states lack of power to do so with respect to interstate commerce, and the necessity of preserving the states' right to license. The NAIC's *Memorandum of Explanation of Proposed Text of Legislation* explains, in part, the purpose of section 2(b) as follows:

> One of the pillars, if not the keystone of State regulation, is

> In section 4(a) of the bill it is implied that in 1948 the Sherman Act shall again come into force unless something has been done in the meantime. However, in section 2(b) it is implied that even in 1948 the Sherman Act shall not invalidate any State regulatory law.[68]

As this Court noted in ***St. Paul Fire & Marine Insurance Co. v. Barry, supra*** at 4975 n.20, Senator O'Mahoney, ultimately one of the three Senate conferees, also understood that section 2(b) was not intended to apply to the antitrust laws. Senator O'Mahoney had introduced a bill designated S. 12 which was virtually identical to S. 340, and was identical to S. 340 with respect to section 2(b). In the January 25, 1945 debate on S. 340 he stated as follows:

> Section 2(b) was drafted and written into the bill which I introduced, in the belief, not that it would be interpreted as an additional exemption from the antitrust laws, but that it would be a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but which we did not have knowledge at the time.

> the licensing power. The United States Supreme Court, in interpreting the commerce clause of the Constitution, has held many times that no State can insist that an individual or other person obtain a license as a condition precedent to the transaction of interstate business. . . .
>
> * * *
>
> It is to be hoped at least, that a declaration of congressional policy and will, combined with the fact that the licensing system has been in use in the field of State insurance regulation since its inception several decades ago, will result in a determination by the United States Supreme Court, if the subject is ever reviewed, that the rule followed in the cases cited will not be applied to the insurance business and that licensing be continued. (Citations omitted).

90 Cong. Rec. A4407 (Nov. 16, 1944).

[68] 91 Cong. Rec. 485 (Jan. 25, 1945) (remarks of Senator Taft).

91 Cong. Rec. 483 (Jan. 25, 1945). By "other acts of Congress" Senator O'Mahoney meant other than the antitrust laws.

Senator Ferguson, co-sponsor of S. 340 and also ultimately one of the three Senate conferees, confirmed that section 2(b) was intended to apply federal laws pertaining to regulation of interstate commerce. He stated that section 2(b) ". . . provides that no Federal legislation relating to interstate commerce shall by implication repeal any existing law unless such act of Congress specifically so provides." *Id.*

Since section 2(b) was not intended to apply to the federal antitrust laws, the problem was solved by expressly excepting such laws from section 2(b). Thus, Senator Ferguson offered an amendment, which was adopted and then passed with S. 340, that amended section 2(b) to except the Sherman and Clayton Acts from its terms. Section 2(b) of S. 340, as passed by the Senate with the Ferguson Amendment on January 25, 1945, read as follows:

> (b) No act of Congress, *except the act of July 2, 1890, as amended, known as the Sherman Act, and/or the act of October 15, 1914, as amended, known as the Clayton Act,* shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides. (Ferguson amendment in italics.)

91 Cong. Rec. 488 (Jan. 25, 1945).

The problem with the Ferguson amendment is that it went too far. In its original form section 2(b) was objectionable because it would have allowed the states to preempt federal antitrust laws without regard to whether federal antitrust laws interferred with state insurance regulation. Amended section 2(b), as passed by the Senate,

did the opposite. It had the effect of preempting state regulation wherever such regulation conflicted with the antitrust laws.

The principle House debate of its version of S. 340 occurred on February 14, 1945.[69] As reported to the House by its Committee on the Judiciary, S. 340 did not contain any of the Senate amendments, including the Ferguson amendment.[70] The reason why the Committee reported to the House as it did, was that S. 340, as introduced, represented a compromise among various factions, and the House Committee was loathe to deviate from that compromise.[71] The Ferguson amendment was not discussed in any of the House debates which culminated in the passage on February 14, 1945 of S. 340 as reported by the House Committee.

Accordingly, the Senate and House went to conference with conflicting sections 2(b). The Senate version of section 2(b) allowed federal antitrust laws to preempt state laws regulating insurance. The House version allowed state insurance laws to preempt federal law unless federal law expressly provided otherwise. What emerged was a new addition to section 2(b), the proviso clause. What that clause did was to *expressly* make the Sherman, Clayton and Federal Trade Commission Acts apply to the business of insurance, but only to the extent that the business of insurance is not regulated by state law. It was, and is, completely consistent with the view that the federal antitrust laws should apply to the insurance industry, but that the states should be able to continue to regulate that industry. It provided no immunity to insurance companies, but did

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[69] *See* 91 Cong. Rec. 1085-94 (Feb. 14, 1945).

[70] *See* 91 Cong. Rec. 1085 (Feb. 14, 1945).

[71] *See* 91 Cong. Rec. 978-79 (Feb. 9, 1945) (remarks of Representative Walter); 91 Cong. Rec. 1085-86 (Feb. 14, 1945) (remarks of Representative Walter).

allow states to mandate certain activities which but for that state action would be subject to federal antitrust laws.

c. The Legislative History Establishes That Petitioners' Activities Are Not Within The Business Of Insurance.

As the foregoing review of the McCarran Act in general, and section 2(b) in particular reveals, the entire thrust of Congressional reaction to *South-Eastern Underwriters* was to accommodate two competing needs. The first, and foremost, was to allow the states to continue to regulate and tax the business of insurance. The second was to apply federal antitrust laws to the business of insurance, but only to the extent that such antitrust laws did not interfere with state regulation of the business of insurance.[72] Section 2(b) as passed satisfied both needs.

Petitioners urge a contorted reading of the "busines of insurance," which in effect destroys that delicate balance between state insurance regulation and federal antitrust laws. Petitioners' interpretation of the meaning of the business of insurance is of whole cloth. It is contrary to the plain meaning of the words as well as the clear legislative history of the McCarran Act, section 2(b) of that Act, and the "business of insurance" language contained in the proviso clause of that section.

As this Court just stated with respect to another section of the McCarran Act in *St. Paul Fire & Marine Insurance Co. v. Barry, supra* at 4974, "[t]he starting point in any case involving construction of a statute is the language itself." The "business of insurance" has a clear straightforward meaning. As this Court noted in *St. Paul Fire & Marine Insurance Co. v. Barry, supra,* and stated in *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), the business of insurance involves "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement." The activities of petitioners which fix the price of a non-insurance product, drugs, are not within the plain meaning of the "business of insurance."

[72] As previously noted, that ability is limited by section 3(b) which provides that there be no limitation upon the Sherman Act prohibition against agreements or acts of boycott, coercion, or intimidation. See H.R. Rep. No. 143, 79th Cong., 1st Sess. (Feb. 13, 1945).

Moreover, the legislative history clearly establishes that the "business of insurance" had a clear straightforward meaning to the drafters of the McCarran Act. They understood that business to include, and intended it to include, activities between and among insurance entities. Moreover, that legislative history establishes that Congress clearly understood from the indictments in *South-Eastern Underwriters* that certain existing practices between and among insurance companies violated federal antitrust laws. It was these intra-insurance industry activities that Congress in section 2(b) sought to allow the states to mandate.

The NAIC, in its Report and draft legislation, described activities within the business of insurance only in terms of activities between and among insurance companies, their insureds, employees and agents. From the outset, the states as represented by the NAIC were concerned that they be allowed to continue to require insurance companies to engage in cooperative activities. Thus, as previously discussed, the initial NAIC statement, the *Report of National Association of Insurance Commissioners,* sought to amend the Sherman and Clayton Acts to allow ". . . all reasonable cooperative procedures necessary and incidential to the establishment of statistical rate bases, rates, coverages and related matters."[73] The *Report* went on to conclude that ". . . it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws

[73] 90 Cong. Rec. A4405 (Nov. 16, 1944).

to apply to the *insurance business*. To *prohibit combined efforts for statistical and rate-making purposes* would be a backward step in the development of a progressive business."[74] (Emphasis added.)

The original NAIC bill of November 16, 1944 in section 4(b) enumerated seven specific practices to which the Sherman Act was not to apply. *Each involved cooperative or concerted activities between and among insurance companies.* None involved practices which restricted or involved entities other than those engaged in providing insurance. If the NAIC contemplated allowing insurance companies to engage in activities with entities not providing insurance, it did not provide for such in its draft legislation.

The actions of the states immediately after passage of the McCarran Act confirm that the business of insurance constitutes activities between and among insurance companies, their insureds, employees and agents. By 1949 almost every state had passed state insurance regulations establishing procedures for cooperative rate making.[75]

The Congressional debates and reports of the House and Senate Committees on the Judiciary indicate that their concern was to allow the states the right to regulate the business of insurance so as to allow the continuation of the cooperative activities between and among insurance companies deemed desirable by the states. Senator Ferguson made this point absolutely clear when he stated that "[t]his bill (*i.e.*, S. 340 as ultimately passed) would permit — and I think it is fair to say that it is *intended* to permit, rating bureaus. . ."[76] Moreover, as this Court

[74] *Id.*

[75] *See* W. Freedman, *Richards on the Law of Insurance* §52 (5th ed. 1952); Rose, *State Regulation of Property and Casualty Insurance Rates*, 28 Ohio St. L. Rev. 669 (1967).

[76] 91 Cong. Rec. 1481 (Feb. 27, 1945) (remarks of Senator Ferguson) (Emphasis added).

recognized in *St. Paul Fire & Marine Insurance Co. v. Barry, supra* at 4976 n.21., Senator O'Mahoney in explaining the meaning of the proviso clause specifically identified rating bureaus as an example of one activity within the business of insurance which would be permitted if mandated by a state.[77] What the proviso clause sought to prevent was private activities in restraint of trade, such as those of petitioners.[78]

Moreover, President Roosevelt in signing S. 340 into law specifically recognized the competing interests of state insurance regulation and the federal antitrust laws, and the accommodation of each achieved in section 2(b). He, like Senator O'Mahoney, focused upon the fact that the proviso clause prevented private activities in restraint of trade. President Roosevelt stated as follows:

> After the moratorium period, the antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved . . . Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by affirmative action of the States.

S. Rosenman, *The Public Papers of Franklin D. Roosevelt* 587 (1950).

Significantly, not only was the business of insurance contemplated only in terms of activities between and among those providing insurance, but also Congress under-

[77] 91 Cong. Rec. 1444 (Feb. 26, 1945) (remarks of Senator O'Mahoney).

[78] 91 Cong. Rec. 1483 (Feb. 27, 1945) (remarks of Senator O'Mahoney).

stood "insurance" to be something entirely different from that engaged in by petitioners. Senator Ferguson explained what "insurance" meant to him. He said as follows:

> The sale of insurance is not the same as the sale of an article in a store. When one buys an article in a store, he brings it home with him. In the case of insurance, he buys a promise to pay upon the happening of a certain event, and that event may be the burning of his home. If the company is not sound and solvent at the time the house burns, or at the time claim is made, there is no insurance at all. That is what we have tried to avoid.

91 Cong. Rec. 1481 (Feb. 27, 1945).

Congress never considered the then infant Blue Cross and Blue Shield prepaid third party provider plans in connection with the McCarran Act. To Congress the business of insurance involved ". . . the distribution of risk according to hazard, experience, and the laws of averages."[79]

Congress never contemplated that section 2(b) could be used to validate restraints of trade imposed by one party, with and upon another who is a provider of services and commodities, and is wholly outside that of the business of insurance. Congress never contemplated that the meaning of the "business of insurance" could be contorted to include such restraints thereby destroying the delicate balance between state insurance regulation and federal antitrust laws it had fashioned.

The legislative history of the McCarran Act, its evolution as well as its purpose, therefore, establish that the Fifth Circuit was correct when it held that petitioners' activities are not within the "business of insurance."

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[79] H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (Nov. 18, 1943).

C. This Court's Interpretation of This Exemption and Other Exemptions From The Antitrust Laws Supports The Decision Of The Fifth Circuit.

As this Court has stated, Congress was primarily concerned in enacting the McCarran Act with insurance rate-making and the power of the state to tax insurance companies.[80] The Act was designed to assure the states a free hand in regulating the dealings between insurance companies and between insurers and their policyholders. Group Life argues that its contracts with pharmacy providers affects its reliability as an insurer and is therefore in the same class as other activities directly related to the relationship between the insurer and the insured. This interpretation of the statute is wholly unwarranted given this Court's prior determinations. As the Fifth Circuit found, policyholders have no interest in the way in which an insurer fulfills its obligations under the policy.[81]

The policyholders only interest is in the amount they must pay as co-pay. The price the insurer pays is not the concern of the policyholder. Thus, the primary effect of the provider contracts is on the relationship between pharmacists and insurers and on competition among pharmacists. While there may be an indirect effect on the rate the sponsor of the plan pays, based on the insurers ability to limit its costs, nothing in this Court's prior interpretations of the Act suggest that such an attenuated relationship justifies extending an antitrust exemption.[82]

This Court's interpretation of other exemptions from

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[80] SEC v. National Securities, Inc., 393 U.S. 453, 458-59 (1969).

[81] Royal Drug, *supra*, 556 F.2d at 1381.

[82] Taken to its logical conclusion, Petitioners' position could be used to justify an insurance company's activities in fixing the price of such goods as paper clips and typewriter ribbons because of the relationship between its costs of supplies and its rates. In fact, Petitioners' position means that there are no activities engaged in by insurance companies which are not exempt.

the antitrust laws supports rejection of Group Life's attempt to broaden the McCarran Act exemption. In recent years, this Court has dealt with exemptions from the antitrust laws involving labor unions,[83] agricultural cooperatives,[84] non-profit institutions,[85] regulated industries,[86] professions,[87] and state or municipal agencies.[88] In these cases, the Court has consistently upheld the principle that statutes exempting segments of the economy from the antitrust laws are to be narrowly construed. In each of these cases the Court examined the purpose of the exemption and determined that the purpose of the exemption did not require, and, therefore, the overriding importance of the antitrust laws did not permit an interpretation of the exemption which would expand the scope of activities which would be exempted from review under the antitrust laws beyond those clearly contemplated by Congress in creating the exemption. As we have shown, Congress never contemplated that the McCarran Act would encompass arrangements between retail pharmacists and insurance companies establishing the retail price at which pharmacists would sell prescriptions.

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[83] Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).

[84] National Broiler Marketing Association v. United States, 46 U.S.L.W. 4620 (June 12, 1978).

[85] Abbott Labs. v. Portland Retail Druggists Association, Inc. 425 U.S. 1 (1976).

[86] FMC v. Seatrain Lines, Inc. 411 U.S. 726 (1973).

[87] Goldfarb v. State Bar of Virginia, 421 U.S. 773 (1975), National Society of Professional Engineers v. United States, — U.S —, 55 L.Ed.2d 637 (April 25, 1978).

[88] City of Lafayette v. Louisiana Power & Light, — U.S. —, 556 L.Ed.2d 364 (March 29, 1978); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

CONCLUSION

By seeking a broad definition of the term "the business of insurance," Group Life seeks to exempt from antitrust review activities involving pharmacists and insurance companies which set the price of retail drugs. The legislative history of the McCarran Act makes it clear that Congress never contemplated exempting activities carried on by insurance companies with non-insurance companies. Group Life would turn the limited right of the states to regulate the business of insurance provided by the McCarran Act into a right of private parties to set the price of goods and services in non-insurance segments of the economy in order to lessen their costs. This definition of the business of insurance goes far beyond the Court's prior interpretations of that term and is at total variance with this Court's consistent position that antitrust exemptions are to be narrowly construed.

Accordingly, the Fifth Circuit's decision should be affirmed.

Respectfully submitted,

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APPENDIX A

"TOTAL EXEMPTION BILL" S. 1362

(78th Cong. 1st Sess., Sept. 15, 1943)

To affirm the intent of the Congress that the regulation of the business of insurance remain within the control of the several States and that the Acts of July 2, 1890, and October 15, 1914, as amended, be not applicable to that business.

Whereas prior and subsequent to the Acts of July 2, 1890, and October 15, 1914, the business of insurance was and has been, and is now, regulated by the several States; and

Whereas, as a matter of local concern, the several States, respectively, each as it deems for the best interest of its citizens, do regulate all acts of insurance companies performed within their respective borders; and

Whereas it has not been, nor is it now, the intent or the desire of the Congress to invade the rights of the States or to assume to itself functions which have long been accepted as best performed by the States; and

Whereas there is now no need, through a Federal bureau or otherwise, for the Congress to displace or encumber the regulation by the States of the business of insurance; and

Whereas it has not been, nor is it now, the intent of the Congress that the Acts of July 2, 1890, and October 15, 1914, as amended, be construed as applying to the business of insurance or as impairing the regulation of that business by the States; and

Whereas it is in the public interest that Congress affirm its intent and desire and safeguard the States in the regulation of the business of insurance: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congres assembled, That nothing contained in the Act of July 2, 1890, as amended, known as the Sherman Act, or the Act of October 15, 1914, as amended, known as the Clayton Act, shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States.

APPENDIX B

"NAIC PROPOSED BILL"

(November 11, 1944)

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the respective States which relate to the regulation of such business and which impose fees or taxes thereon.

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.

SEC. 3. Nothing contained in the Federal Trade Commission Act, as amended, or the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) Until July 1, 1948, the act of July 2, 1890, as amended, known as the Sherman Act, and the act of October 15, 1914, as amended, known as the Clayton Act, shall not apply to the business of insurance, or to acts in the conduct of such business.

(b) On and after July 1, 1948, the said Sherman Act shall not apply (1) to any agreement or concerted or cooperative action which prescribes the use of rates for insurance, insurance policy or bond forms or underwriting rules or plans if such rates, forms, rules, or plans are required, by the law of the State in which they are to be used, either to be approved by the supervisory official or

agency of such State having authority with respect thereto, or to be filed subject to disapproval by such official or agency; (2) to the use of any such rates, forms, rules, or plans which have been so approved or filed; (3) to any cooperative or joint service, adjustment, investigation, or inspection agreement relating to insurance, or to acts under such agreements; (4) to any agreement or concerted or cooperative action among two or more insurers to insure, reinsure, or otherwise apportion the risks taken by the parties to such agreement or any of them, or to issue policies or bonds with joint or several liability; (5) to any agreement or concerted or cooperative action with respect to the payment of insurance agents' or brokers' commissions; (6) to any agreement or concerted or cooperative action with respect to the collection and use of statistics or with respect to policy or bond forms; or (7) to any agreements or concerted or cooperative action providing for the cooperative making of insurance rates, rules, or plans, if such agreement does not require the use of such rates, rules, or plans.

(c) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this act shall be construed to affect in any manner the application to the business of insurance of the National Labor Relations Act, as amended, or the Fair Labor Standards Act of 1938, as amended.

SEC. 6. As used in this act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 7. If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPENDIX C

"ORIGINAL McCARRAN-FERGUSON PROPOSAL"

S. 340

(79th Cong., 1st Sess., Jan. 18, 1945)

That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.

SEC. 3. Nothing contained in the act of September 26, 1914, known as the Federal Trade Commission Act as amended, or the act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. For the purpose of enabling adjustments to be made and legislation to be adopted by the several States and Congress, until June 1, 1947, the act of July 2, 1890, as amended, known as the Sherman Act, shall not apply to the business of insurance, or to acts in the conduct of such business, and until January 1, 1948, the act of October 15, 1914, as amended, known as the Clayton Act,

shall not apply to such business or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, coercion, or intimidation.

SEC. 5. Nothing contained in this act shall be construed to affect in any manner the application to the business of insurance of the act of July 5, 1935, as amended, known as the National Labor Relations Act, or the act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938.

SEC. 6. As used in this act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 7. If any provision of this act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.